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IN THE

Supreme Court of the United States

October Term, 1968
No. 464

COURTESY CHEVROLET, INC.,
Petitioner,

vs.

TENNESSEE WALKING HORSE BREEDERS, ETC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

Introductory Paragraph.

Courtesy Chevrolet, Inc., a corporation, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 23, 1968, following denial of your Petitioner's timely Petition for Rehearing therein on May 28, 1968.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit entered May 3, 1965 (Appendix I) is reported at 344 F. 2d 860. The opinion of the United States Court of Appeals for the Ninth Circuit entered April 23, 1968 (Appendix II) is reported at 393 F. 2d 75. The only opinion rendered by the United States District Court for the Central District of California was a Memorandum Opinion *re* Attorneys' Fees

and Costs, dated September 13, 1966; this opinion, not reported, is set forth at Appendix III. The oral decision of the District Court for the Central District of California is contained in the Reporter's Transcript at pages 1269 to 1277, and is set forth at Appendix IV.

Jurisdiction.

The Judgment of the United States Courts of Appeals for the Ninth Circuit was entered on April 23, 1968. A timely Petition for Rehearing was denied on May 28, 1968 (Appendix V, below). The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code, §1254(1); 28 U.S. Code, §1651; 28 U.S. Code, §2106, and Rule 19(b) of the Revised Rules of the United States Supreme Court.

Questions Presented.

1. Whether, in a private anti-trust action, if the Trial Court finds that a plaintiff has been damaged by reason of defendant's unlawful activities, plaintiff's damages must be limited to those items proved with absolute certainty, once the fact of damage resulting from the unlawful activities has been proved.

2. Whether, in such an action, a plaintiff is entitled to general damages.

3. Whether since there was a showing of damages in excess of the loss of fees from the services of only one of Petitioner's studs, and for more than only one year, the District Court erred in not awarding at least something for such additional damages.

4. Whether the evidence of plaintiff's damages, resulting from defendant's unlawful activities, was so uncertain and indefinite that the Trial Court could not,

as a matter of law, have made a reasonable estimate thereof.

5. Whether, in such an action, once the *fact* of damages has been established, the plaintiff is to be denied reasonable attorneys' fees under the provisions of 15 U.S. Code, §15, merely because the *extent* of damages is difficult of precise ascertainment.

6. Whether the Court(s) below erred in not requiring a finding as to the reasonable value of Petitioner's attorneys' services.

7. Whether the District Court erred in holding that the test as to reasonable attorneys' fees in a private anti-trust action is not what plaintiff's attorneys should be paid, but rather what sum should be contributed by the defendants to plaintiff's attorneys' fees, without regard to what a reasonable fee would be.

8. Whether the award of attorneys' fees is, in any event, inadequate and contrary to the evidence.

9. Whether the Court of Appeals erred in not discussing any of the points of law raised by the extensive briefs filed by both parties to the appeal.

Statutes Involved.

The following statutory provisions are set forth in Appendix VI: 15 U.S. Code, §1; 15 U.S. Code, §2; 15 U.S. Code, §15; 15 U.S. Code, §26.

Statement.

This case originated with the filing of a Complaint by Petitioner under the provisions of the Federal Anti-trust Laws, on Petitioner's allegations that it had been injured in its business and property by reason of Respondent's and others' violations of §§1 and 2 of Title 28 of the United States Code, commonly referred to as

§§1 and 2 of the Sherman Antitrust Act. The Findings of Fact and Conclusions of Law of the District Court, in so far as Respondent's unlawful activities are concerned, are not in conflict.

The Complaint originally joined with Respondent various of its Directors and officers as parties defendant. The Trial Court dismissed the action as to all parties and ordered service quashed. Upon appeal to the United States Court of Appeals for the Ninth Circuit, the District Court's Order quashing service and Judgment of Dismissal was reversed as to Respondent. (*Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' etc. of America, et al.*, (1965) 344 F. 2d 860; Appendix I hereto.)

The case then proceeded to trial without a jury on June 29, 1966, and continued through July 11, 1966. Findings of Fact, Conclusions of Law and Judgment for Petitioner were made and entered on October 20, 1966 (Appendix VII). Following a timely Motion by Petitioner, the District Court modified its Judgment to provide for costs to Petitioner on December 9, 1966.

Petitioner is a corporation which, among other activities, is engaged in the breeding, training, sale, boarding and exhibition of Tennessee Walking Horses and owns and operates a breeding farm and stables for those purposes (Facts 1, 2).[1] Prior to July, 1963, Petitioner had invested the sum of $711,218.70 for its facility located at Somis, California [R. T. 151].[2]

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[1]Findings of Fact and Conclusions of Law, Facts 1 and 2. Petitioner refers to Findings of Fact herein as "Fact ....."; Conclusions of Law as "Law .....".

[2]Reporter's Transcript of Proceedings, June 29, 1966 through September 6, 1966.

Respondent is incorporated in the State of Tennessee, has members located in various areas throughout the United States, and at the time of the acts complained of transacted business and was found in, and the acts complained of occurred within, the Central District of California (Facts 3, 4 and 8). The Trial Court found that one of the objectives of Respondent is to collect, record and preserve the pedigrees of the strain of horses known as Tennessee Walking Horses and the publication of a Register or stud book and other matters pertaining to the breeding, exhibiting and sale of such horses (Fact 5). It is the only association engaged in recording the pedigrees of such horses and the issuance of pedigree papers to individual owners and transferees (Fact 6).

Respondent is the only association in which Tennessee Walking Horses may be registered as such and maintains the only generally recognized registry of Tennessee Walking Horses (Facts 6, 11). Without such registration a horse cannot compete in Tennessee Walking Horse shows (Fact 19) and no foal of any unregistered Tennessee Walking Horse may be registered as a Tennessee Walking Horse. The market value of a Tennessee Walking Horse is substantially depressed if the horse cannot be registered (Fact 20). Respondent's By-Laws permit the registration of Tennessee Walking Horses by non-members of the Association, as well as members, but at a different charge (Fact 22). Initial membership fees and annual membership fees are required to be paid by each member [R. T. 79].

Respondent collects and disseminates information concerning the breed to its members throughout the United States by means of a monthly Bulletin (Fact

7). Respondent establishes, publishes and enforces regulations for the judging, showing and performance of Tennessee Walking Horses (Fact 13), maintains a list of recognized licensed judges and attempts to supervise their performance (Facts 14, 15).

Respondent also sponsors some classes at horse shows by donating trophies and prize money (Fact 16).

On and prior to July 13, 1963, Petitioner was a member in good standing of the Association (Facts 2, 32) and R. Mitchell McClure, Petitioner's President, was the Regional Vice President of Respondent (Fact 29). Prior to July 13, 1963, Petitioner had invested the sum of $711,218.70 in its business of breeding, raising, showing and selling horses for profit [R. T. 151]. Petitioner was dependent upon its membership in Respondent for the successful conduct of that business and had advertised and held itself out to the public, and particularly to prospective purchasers of its horses and services, that it had been a member of Respondent and directly identified therewith (Fact 2).

On July 13, 1963, Respondent was found to have arbitrarily and unreasonably suspended Petitioner's membership in Respondent (Law 6d, 6e; Facts 30, 32). Petitioner's membership dues were refused (Fact 38). Notice of the suspension of Petitioner and R. Mitchell McClure was published in the Respondent's Bulletin, on the front page, bordered in black (Fact 32). The services of Respondent, including the registration of horses, transfer thereof, or showing before judges of Respondent, were denied the Petitioner (Fact 32; Law 6) notwithstanding such services were available to non-members of Respondent (Fact 22). One of Petitioner's stallions, "Mr. Millionaire", had sired colts owned by

persons disassociated from Petitioner (Fact 33). These persons applied for registration of the colts, which applications were denied by Respondent because of Petitioner's suspension (Fact 34).

At the time of the filing of this action, a majority of Respondent's officers, directors and agents were engaged in the business of breeding, training, sale and exhibiting of Tennessee Walking Horses and to some degree were competing with Petitioner (Fact 39) and the Trial Court found that the unlawful activities of Respondent were in part motivated by their selfish personal financial interests (Law 5), and that their actions in boycotting and restricting Petitioner were done for the purpose of destroying the business of Petitioner and others similarly situated (Law 6d).

The District Court entered Judgment for Petitioner. The Judgment enjoined Respondent from refusing to register Petitioner's horses and foal from mares owned by third persons and bred by stallions owned by Petitioner. It directed Respondent to register the transfer of horses and cause the same to be immediately consummated. It enjoined Respondent from denying Petitioner any of the privileges of Respondent and ordered it to reinstate Petitioner's membership. Respondent was ordered to publish in its next monthly bulletin the Court's Judgment in full, together with a notice of Petitioner's reinstatement. Petitioner was awarded damages in the sum of $3,400.00, trebled to $10,200.00, together with the sum of $5,000.00 as attorneys' fees (Judgment). Pursuant to its Order Modifying Judgment, Petitioner was also awarded Court costs.

The damages of $3,400.00 consisted of the loss of stud fees of one of Petitioner's stallions during the year

1964 (Law 15). The District Court denied recovery of other damages based on its finding that "the evidence of other damage to plaintiff is too indefinite and speculative to permit the Court with any degree of certainty to estimate the amount thereof." (Fact 42, Law 16). The Trial Court did not, however, find that Petitioner had not sustained other damages.

The evidence presented by Petitioner on damages was essentially in three categories:

1. Losses incurred during the period of unlawful activities, in excess of those in the last full calendar year prior to the illegal suspension, totalling $130,-176.34.

2. Testimony of those professionally engaged in the training, breeding, exhibition and sale of Tennessee Walking Horses that Petitioner might reasonably be expected to realize an annual return of ten to fifteen per cent on its invested capital.

3. Testimony of Petitioner's President, trainer and other expert witnesses that Petitioner would reasonably be expected to derive the sum of $79,000.00 per year in net profits from its breeding program, but for the unlawful activities of Respondent.

With respect to attorneys' fees, the Trial Court found as facts that (Facts 43-52):

1. Plaintiff's attorneys expended more than 2,-289½ hours in the preparation and presentation of this case, excluding time spent up to and including the prior successful appeal to this Court.

2. There was no prior action by the government and plaintiff's counsel had not had the benefit of a prior Judgment or Decree.

3. Counsel for both plaintiff and defendant have outstanding reputations at the bar.

4. The trial involved novel and difficult points of law and involved fact situations not previously reported in antitrust litigation.

5. Plaintiff's counsel traveled extensively throughout the United States to gather evidence and interview witnesses and was required to rely to a considerable extent on the testimony of adverse witnesses to establish its case.

6. Plaintiff's counsel has done a "prodigious amount of work" in presenting this case.

7. Plaintiff expended $78,496.40 in attorneys' fees, travel expense, and other out-of-pocket expenses.

8. Defendant should be required to "contribute" $5,000.00 toward attorneys' fees.

The Court of Appeals for the Ninth Circuit reversed the District Court's Judgment on the sole question of attorneys' fees noting that the "highly respected and competent" expert testimony was that the reasonable value of Petitioner's attorneys services was $140,000.00 to $150,000.00, directing the District Court to increase attorneys' fees to $10,000.00. (See Appendix "II"). As to all other matters, the Judgment of the District Court was affirmed, the Court stating, as to damages:

> "After careful review of the record in the case and due consideration of the briefs and oral arguments of the attorneys, we are unable to say that the findings of fact of the District Court and its conclusions of law thereon are clearly erroneous in respect to the award of $10,200.00, although the compensation allowed seems quite low in the circumstance." (393 F. 2d 75, at page 77).

REASONS FOR GRANTING THE WRIT.

I.

Damages.

A. Public Policy of the Federal Antitrust Laws.

If the Judgment of the District Court is permitted to stand, the private enforcement of the Antitrust Laws will have been dealt a serious impairment, as few businesses can afford the expense of a private antitrust action when their damages are to be limited to those which can be proven with absolute certainty.

As stated in *Atlantic City Electric Co. v. General Electric Co.* (D.C. S.D.N.Y. 1964) 226 F. Supp. 59, 71, appeal denied 337 F. 2d 844 (relying on this Court's decision in *United States v. Borden Co.,* (1954), 347 U.S. 514, 518, 74 S. Ct. 703, 706, 98 L. Ed. 903):

> "Finally, the most significant consideration is the strong policy in favor of private treble-damage actions, which are intended not only to compensate those injured by violation of the Antitrust Laws, but also to function as an independent method of enforcing antitrust policy."

This Court has stated, and the Courts below have apparently disregarded:

> "The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."
>
> *Bigelow v. RKO Radio Pictures, Inc.,* (1946), 327 U.S. 251, 265, 66 S. Ct. 574, 90 L. Ed. 1040.

B. The District Court's Judgment Is Squarely in Conflict With Rules Laid Down by This Court in the Ascertaining of the Amount of Damages Once the Fact of Damages Has Been Proven.

The decision of the District Court, and the affirmation by the Court of Appeals, on the question of Petitioner's damages, is squarely in conflict with this Court's decision in *Story Parchment Co. v. The Paterson Parchment Paper Co.*, (1931) 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544; *Eastman Kodak Co. v. Southern Photo Material Co.*, (1923) 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684; and *Bigelow v. RKO Radio Pictures*, (1946) 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 1040, and with decisions in other Circuits, such as: *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, (C.A. Ohio, 1966), 358 F. 2d 790; and *Pennington v. United Mine Workers of America*, (C.A. Tenn., 1963) 325 F. 2d 804, reversed on other grounds, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626, certiorari denied 381 U.S. 949, 85 S. Ct. 1796, 14 L. Ed. 2d 723, as well as decisions in the Ninth Circuit, itself, such as *Flintkote Co. v. Lysfjord*, (9th Cir. 1957) 246 F. 2d 368.

The Courts below gave no recognition to the principles set down by this Court with respect to the following language:

> ". . . [W]hen, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount; so as to enable them to make

the most intelligible and probable estimate which the nature of the case will permit."

Story Parchment Co. v. The Paterson Parchment Paper Co., (1931) 282 U.S. 555, 564, 51 S. Ct. 248, 251, 75 L. Ed. 544.

Petitioner's business was barely started when Respondent completely foreclosed Petitioner from any possibility of profits through the means of a total and unlawful boycott, motivated, at least in part, by the "selfish, personal, financial interest" of Respondent's directors (Law 5).

Yet, the District Court limited Petitioner to only that single item of damage that it was able to prove with absolute certainty, entirely overlooking this Court's directions that it is the wrongdoer who should bear the risk of uncertainty (*Bigelow v. RKO Radio Pictures, Inc., supra*), not the innocent, and that the Court should have made "the most intelligible and probable estimate which the nature of the case will permit,"

Story Parchment Co. v. The Paterson Parchment Paper Co., (1931) 282 U.S. 555, 564, 51 S. Ct. 248, 251, 75 L. Ed. 544.

C. The District Court's Judgment Is Squarely in Conflict With Rules Laid Down by the Ninth Circuit as Well as Other Circuits.

The Ninth Circuit, in the past, has followed this Court's mandate set down in, for example, *Bigelow v. RKO Radio Pictures, Inc., supra.* Thus, in *Flintkote Co. v. Lysfjord*, (9th Cir. 1957/1937?) 246 F. 2d 368, at page 392, the Ninth Circuit stated:

"We take it that the controlling rule today in seeking damages for loss of profits in antitrust

cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and *some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data,* and render its verdict accordingly.' *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. at page 264, 66 S.Ct. at page 580. The cases have drawn a distinction between the quantum of proof necessary to show the fact as distinguished from the amount of damage; the burden as to the former is the more stringent one. In other words, the fact of injury must first be shown before the jury is allowed to estimate the amount of damage." (Page 392) (Emphasis supplied).

But the opinion of the Ninth Circuit below, entirely overlooks these concepts.

II.

Attorneys' Fees.

A. The Failure of the Courts Below to Award a Reasonable Attorneys' Fee, or to Make a Finding of Fact as to Such a Fee as Requested, Requires Review to Avoid Degradation of the Antitrust Laws.

The Court of Appeals' opinion below recognized that the District Court abused its discretion in awarding an attorneys' fee of only $5,000.00 (393 F. 2d 75 at p. 77) and directed that the fee be increased to $10,000.00 (393 F. 2d 75 at p. 77). In ordering the increase, the Court of Appeals noted that Petitioner's counsel had devoted a total of 2,289 hours exclusively

to this litigation and that Petitioner had expended over $78,000.00 in attorneys' fees, travel expense and other out-of-pocket expenses, and that "A highly respected and competent member of the Los Angeles Bar estimated reasonable attorneys' fees for plaintiff in this case at $140,000.00 to $150,000.00." (393 F. 2d 75 at p. 77). This testimony was uncontradicted.

Neither the Trial Court nor the Court of Appeals made a Finding of what the reasonable fees for Petitioner's attorneys were in the case, although the Trial Court made extensive findings of fact as to the work performed and the difficulties confronted by Petitinoner's attorneys (Facts 43-49).

B. Where the Statute Calls for the Payment of a Reasonable Attorneys' Fee, It Is Improper for the Trial Court to Award Only a Portion Thereof as the Defendant's "Contribution".

The Trial Court did not award Petitioner reasonable attorneys' fees, but instead concluded that the Respondent was to *contribute* $5,000.00 *toward* Petitioner's fees (Fact 52).

This Court has never interpreted the meaning of "reasonable attorneys' fees" as set forth in 15 U.S. Code, §15. It is submitted, however, that where the Code provides for a reasonable attorneys' fee, the Trial Court does not fulfill its statutory duty by directing the losing defendant to merely "contribute" "toward" such fees.

The "contribution test" suggested and ordered by the Trial Court was specifically rejected as not satisfying the Court's duty in *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents' Conference*, (D.C. Pa. 1958),

166 F. Supp. 163, affirmed 273 F. 2d 218, reversed on other grounds, 365 U.S. 127, 81 S. Ct. 523, but used in *Webster Motor Car Co. v. Packard Motor Car Co.*, (D.C.D.C. 1958), 166 F. Supp. 865, certiorari denied 355 U.S. 822, 78 S. Ct. 29.

The above two District Court cases are the only two cases discussing the point ("contribution test") and are directly in conflict.

C. Denial of Reasonable Attorneys' Fees Where the Fact of Damage Is Shown But the Amount Thereof Is Considered Uncertain, Is Contrary to the Letter and Spirit of the Antitrust Laws.

The Trial Court rendered a written, but unreported, opinion regarding its award of attorneys' fees (Appendix "III"). It there stated:

> "It is obvious that counsel has done a prodigious amount of work in presenting this case, but the question before the Court is not necessarily how much should plaintiff's counsel be paid, but rather how much should the unsuccessful defendant be required to contribute to its payment."

The Trial Court then considered the following factors:

(a) A large portion of the final relief granted was injunctive relief.

(b) All the damages claimed was not proved.

(c) The defendant Association was composed of thousands of members, few, if any, of whom, except for the Board of Directors, had any knowledge of, part in, or sympathy for the unlawful acts of the Board.

The last consideration, above, is totally irrelevant to the issue of attorneys' fees and purports to equate the guilt of the corporation for the acts of its officers with the innocence of its members or stockholders.

The fact, if that it be, that Petitioner could not prove with mathematical certainty all its damages, certainly should not require further damages to it by denying attorneys' fees.

The effect of the Court's holding is to avoid the Statutory Mandate to award a reasonable attorney's fee, and the Court of Appeals, by being silent, is permitting the avoidance to remain.

The fact of damage was proven. The Court so found. Therefore the Court should have put the burden of uncertainty on Respondent and not on Petitioner. Requiring Petitioner to pay nearly all of its attorneys' fees is a clear disregard of this Court's admonition:

> "The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."
>
> *Bigelow v. RKO Radio Pictures, Inc.*, (1946) 327 U.S. 251, 265, 66 S. Ct. 574, 90 L. Ed. 1040.

Conclusion.

Private enforcement of the Federal Antitrust Laws has always been considered by this Court as an important aid to the general scheme of antitrust enforcement. Yet, if an individual or relatively small business is faced with the burden of not only having to prove that he has been wronged and damaged by

violations of antitrust laws, but also that unless he can prove all of his damages with mathematical preciseness, he may have to suffer the additional burden of very costly attorneys' fees and related costs, it is doubtful that private enforcement can be expected to continue.

For the reasons stated, it is respectfully submitted that this Petition for Certiorari be granted.

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